

# **Review of Port Competition and Regulation in NSW**

## **Issues Paper**



**August 2007**

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## Acronyms

ABS	Australian Bureau of Statistics
ACCC	Australian Competition and Consumer Commission
ANZSIC	Australian and New Zealand Standard Industrial Classification
BTRE	Bureau of Transport and Regional Economics
CPA	Competition Principles Agreement
CIRA	Competition and Infrastructure Reform Agreement
COAG	Council of Australian Governments
DPC	Department of Premier and Cabinet (NSW)
IPART	Independent Pricing and Regulatory Tribunal (NSW)
NCP	National Competition Policy
NPC	Newcastle Port Corporation
NRA	National Reform Agenda
NSW	New South Wales
PC	Productivity Commission
PKPC	Port Kembla Port Corporation
PSA	<i>Price Surveillance Act 1983</i>
PwC	PricewaterhouseCoopers
SPC	Sydney Ports Corporation
TPA	<i>Trade Practices Act 1974</i>

# 1 What this review is about

In February 2006, the Council of Australian Governments (COAG) committed to the National Reform Agenda (NRA) which includes competition, regulation and human capital reforms aimed at increasing the nation's productivity and workforce participation.<sup>1</sup>

The purpose of this review is to assess the regulation of port activity at major NSW ports in terms of its consistency with the Competition and Infrastructure Reform Agreement (CIRA), to which the NSW Government committed in February 2006 as part of the NRA. The main purpose of the CIRA is to provide for a simpler and consistent national approach to the economic regulation of nationally significant infrastructure, including through recognition that, in the first instance, the terms and conditions of access to such infrastructure should be determined through commercial negotiation, and that economic regulation should only be used where it is warranted.

In particular, this review will:

- assess whether economic regulation is required to promote competition between users and providers of port facilities and services or to prevent any abuse of market power (where economic regulation is defined as price monitoring, price setting, or regulated access arrangements);
- assess whether the prices, terms, and conditions that users of port facilities face reflect commercially agreed outcomes between the parties and that no government business accrues any net competitive advantage as a result of its public sector ownership;
- determine whether any restrictions to competition imposed by regulation generate benefits to the community that outweigh any costs; and
- identify any inconsistencies or divergence from the principles to which the NSW Government has committed, and make recommendations for achieving consistency with the principles.

The Terms of Reference (ToR) for the study are based on a review of the significant NSW ports against Part 4.1 and 4.2 of CIRA.

## The CIRA

The CIRA (Parts 4.1 and 4.2) establishes a national framework for the regulation of nationally significant infrastructure (also shown in **Appendix A**). This relates to ports regulation such that:

- ports should only be subject to economic regulation where a clear need for it exists in the promotion of competition in upstream or downstream markets or to prevent the misuse of market power; and
- where a Party decides that economic regulation of significant ports is warranted, it should conform to a consistent national approach whereby
  - third party access to services is on the basis of terms and conditions agreed between the operator of the facility and the person seeking access;

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<sup>1</sup> COAG reconfirmed its commitment to the NRA in July 2006 and April 2007. The Communiqués from these meetings can be found at: <http://www.coag.gov.au>

- commercial outcomes are promoted by establishing competitive market frameworks that allow competition in and entry to port and related infrastructure services;
- if regulatory oversight of prices is warranted it is undertaken by an independent body which publishes relevant information; and
- if access regimes are required, they should be certified in accordance with the Trade Practices Act 1974 and the Competition Principles Agreement; and
- competition in the provision of port and related infrastructure facility services are allowed for, unless a transparent public review indicates that the benefits of restricting competition outweigh the costs to the community including that:
  - port planning facilitate the entry of new suppliers of port and related infrastructure services;
  - where third party access is provided, that access is on a competitively neutral basis;
  - commercial charters for port authorities should include guidance to seek a commercial return while not exploiting monopoly power; and
  - any conflicts of interest between port owners, operators, or service providers due to vertically integrated structures be addressed by the relevant Party on a case by case basis with a view to facilitating competition.

The focus of the CIRA on economic regulation precludes the evaluation of the safety functions of the port corporations, which are required under their operating licence.

Only ports defined as ‘significant’ are required to be reviewed under the CIRA. Part 4.3 of the CIRA defines significant ports as major capital city ports, major bulk commodity export ports, and major regional ports catering to agricultural and other exports. The NSW ports that are defined as ‘significant’ for the purpose of this review include Sydney Harbour (Glebe Island, White Bay, Darling Harbour, and Gore Cove), Port Botany (Botany Bay, Brotherson Dock and Kurnell), Port of Newcastle and Port Kembla (Inner and Outer Harbour), including the handling and storage facility operations at these ports. Minor ports in NSW (e.g. Yamba and Eden) are not required to be reviewed under the CIRA. Aerial views of the geographic ports are found in **Appendix B**.

This review is being conducted by PricewaterhouseCoopers (PwC), and is being overseen by a Steering Committee comprising representatives from the Department of Premier and Cabinet, NSW Treasury, NSW Maritime, and the Ministry of Transport.

Given the importance of competition and competitive outcomes to maximising the contribution of major ports to economic activity, this review is a significant review for the ports industry.

## 1.1 Background

NSW ports are an integral link in the freight logistics chain and are of significant strategic importance to the State. They are the international gateway for NSW and Australian trade activity, with three major NSW port

corporations handling \$61.5 billion of trade per annum or 147.4 million gross registered tonnes.<sup>2</sup>

Since the ports were corporatised in 1995, tonnage throughput at the ports of Newcastle, Port Kembla, Sydney Harbour, and Port Botany has risen significantly, rising by a combined 30 percent over the past 10 years. Over this period, the volume of trade through Sydney ports has increased by approximately 50 per cent.<sup>3</sup> Port Botany is currently Australia's leading container import port, Newcastle is one of the largest coal export ports in the world, and Port Kembla is Australia's leading port for steel exports and the second largest for grain.<sup>4</sup>

Promoting trade in major NSW ports is critical to the many industries that rely on port services to deliver to, or receive goods from, the international market. Ensuring ports are functioning efficiently and in a way that ensures reasonable and fair access for all players is therefore a high priority for the NSW Government.

The NSW Ports Growth Plan provides an outline of directions for the future growth and development of port locations and capacity in NSW (**see Section 3**).

## **1.2 Information for stakeholders**

The purpose of this paper is to identify key issues in port competition and regulation in NSW, and to seek submissions from interested parties addressing the matters relevant to the review.

### **How to make a submission**

PwC invites written submissions from interested parties in relation to the issues raised in this paper. Submissions may cover one or more areas of interest to this review. To assist stakeholders in framing their submissions, key questions are posed throughout the issues paper.

Submissions should be provided to the review team no later than **5pm Monday 10 September 2007**.

Submissions may be sent by email, mail, or fax.

By email: [sarina.fisher@au.pwc.com](mailto:sarina.fisher@au.pwc.com)

By mail: Sarina Fisher, PwC Economics, GPO Box 2650 Sydney NSW 1171

By fax: (02) 8286 1431

Submissions will be made publicly available by being posted on the NSW Maritime website ([www.maritime.nsw.gov.au](http://www.maritime.nsw.gov.au)), except where a submission either wholly or partly contains confidential or commercially sensitive information. Where this is the case, submissions should be clearly marked as being provided in 'IN CONFIDENCE'.

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<sup>2</sup> \$50 billion in Sydney Ports, \$7.5 billion in Newcastle Ports & \$4 billion in Pt Kembla – Source: Port Annual Reports 2006 & <http://parliament.nsw.gov.au/prod/PARLMENT/hansArt.nsf/5f584b237987507aca256d09008051f3/054f9aeebd49126fca2572180013f2ce!OpenDocument>

<sup>3</sup> Source: NSW Maritime Newsletter 2007, *Maritimes*, "From the Chief Executive's Desk", Autumn 2007, <http://maritimes.optin.com.au/maritimes/autumn2007/ceo.html>

<sup>4</sup> Source: NSW Maritime Website 2007, [http://www.waterways.nsw.gov.au/ports\\_plan.html](http://www.waterways.nsw.gov.au/ports_plan.html)

To assist stakeholders in preparing their submissions and to provide additional information to the review team, a roundtable will be held at PwC's Sydney city office on **Friday 24 August** from 9am to 11am. If you would like to attend the roundtable, please register your interest via email to [sarina.fisher@au.pwc.com](mailto:sarina.fisher@au.pwc.com) or phone Hailey Napper on (02) 8266 1493 and details of the roundtable will be forward to you.

### **Review process and timetable**

Stakeholder views provided at the roundtable and in submissions will be analysed in preparing the final report for the NSW Government. Table 1 shows the timetable for key milestones for this review. The CIRA commits jurisdictions to undertaking a transparent public review of ports regulation, and it is anticipated that the final report will be released publicly following consideration by the Government.

**Table 1 – Timetable of Review**

<b>Action</b>	<b>Timetable</b>
Issue paper released and submissions invited	10 August 2007
PwC roundtable	24 August 2007
Due date for submissions	10 September 2007
Final report presented to the NSW Government	9 November 2007

## 2 Overview of major NSW ports

Major ports in NSW have separate geographic locations and each facilitates a different composition of trade (see Table 2).

- The Port of Botany is the second-largest container port in Australia and is the predominant port for container imports, most of which have their final destination within some 40 kilometres of the port.
- The Port of Newcastle is a major bulk (non-containerised) port and one of the world's leading coal export ports, with coal exports totaling 80.3 million mass tonnes in 2005/06.
- Port Kembla is also a major bulk (non-containerised) port and is Australia's leading port for steel exports and second largest for grain exports.<sup>5</sup>

Figures 1 and 2 indicate the proportion of containerised and bulk trade in the significant NSW ports. Sydney Harbour and Port Botany dominate the volume of containerised trade, with the majority passing through Port Botany. Port of Newcastle moves the largest proportion of non-containerised bulk trade volume.

**Table 2 – Trade at Major NSW Ports 2005/06**

Geographic Harbour	Details 2	Quantity of trade movements		% of trade movements that are exported <sup>6</sup>	
		Containerised (TEU <sup>7</sup> )	Non-container (million mass tonnes)	Containerised	Non-container
Sydney Harbour	▪ <i>White Bay</i> – containers & break bulk (timber, paper, steel, etc.)	34,684	14.5*	49%	N/A
	▪ <i>Glebe Island</i> – imported motor vehicles & dry bulk goods (car imports relocate to Port Kembla in 2008)				
	▪ <i>Darling Harbour</i> – dry bulk, bulk liquids, general cargo				
	▪ <i>Gore Cove</i> – private oil terminal				
Port Botany	▪ <i>Brotherson Dock</i> – container cargo & bulk liquids ▪ <i>Kurnell</i> – private oil terminal	1.41m		48.9%	N/A
Port of Newcastle	▪ Bulk coal (94%) ▪ Bulk other (6%) ▪ Container freight insignificant (to grow to relieve Port Botany)	12,195	85.6	N/A	97%
Port Kembla	▪ Bulk coal (42%) ▪ Bulk other (58%) ▪ Container freight insignificant	550	25.9 <sup>8</sup>	95%	64%

Note: Private terminal trade statistics N/A. Source: Port Annual Reports 2006, & Newcastle Port Auditor-General's report to Parliament 2006, p.273; (\*2004/05 figure from BTRE 2006, Container and Ship Movements Through Australian Ports 2004/05 to 2024/25, p. xviii), IPART May 2007 Port Botany Issues Paper

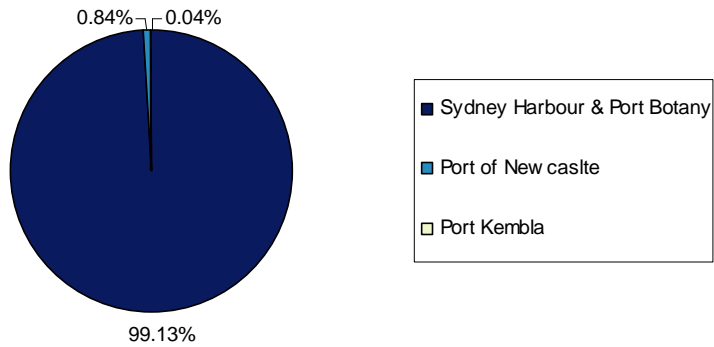
<sup>5</sup> Source: Ibid & <http://www.apf.gov.au/house/committee/trs/networks/subs/sub096.pdf>

<sup>6</sup> Includes empty containers (empty containers make up 51% of SPC's total exports).

<sup>7</sup> Note: TEU = Twenty-foot Equivalent Unit

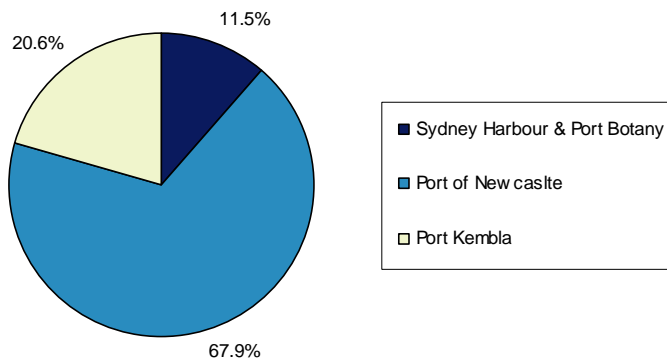
<sup>8</sup> Note: Figure is in million revenue tonnes (a revenue tonne is mass of 1,000 kg or a volume of 1 cubic metre or 1 kilolitre, whichever gives the largest number of units of cargo quantity).

**Figure 1 – Containerised Trade at NSW Major Ports 2005/06 (million mass tonnes)**



Source: Port Annual Reports 2006

**Figure 2 – Non-containerised Trade at NSW Major Ports 2005/06 (TEU)**



Source: Port Annual Reports 2006

## 2.1 Port industry participants

There are a range of participants in the port industry involved in the movement of cargo across the waterfront.

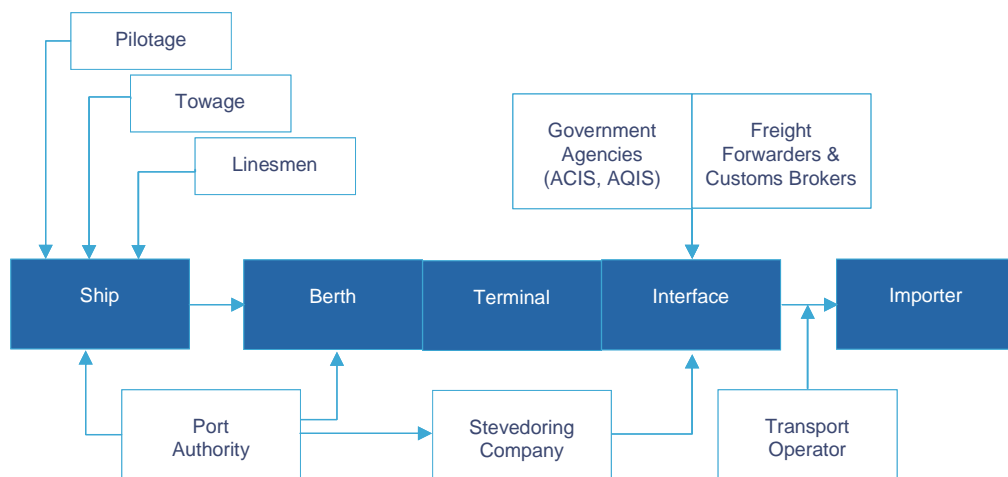
- **NSW Port State Owned Corporations:** There are three NSW Government owned port corporations that operate in the three significant ports in NSW: the Sydney Ports Corporation (SPC), the Port Kembla Port Corporation (PKPC), and the Newcastle Port Corporation (NPC).
- **Shipping lines/shippers:** Shipping lines own and operate shipping vessels for sea transportation of freight. Shippers move cargo across the waterfront for shipping lines, and include container shipping

(containerized and break-bulk freight<sup>9</sup>) and bulk shipping (such as coal, grain, and general freight).

- **Services to shipping:** There are a range of ancillary services provided by mainly private businesses to shipping lines and in some cases shippers, including pilotage, towage, linesmen, and ship repair.
- **Stevedoring:** Stevedores are the intermediary between the shipping lines and the transport operator, and provide 'ship side' lifting of cargo on and off vessels.
- **Road and rail transport operators:** Road and rail transport operators move cargo from stevedores and storage on the behalf of importers and exporters.

The way in which each participant relates to others in the industry is illustrated in Figure 3.

**Figure 3 – Industry Participants in the Australian Waterfront**



Source: Productivity Commission 1998, *International Benchmarking of the Australian Waterfront*, Research Report, AusInfo, Canberra, April

## 2.2 Operation of the NSW Port State Owned Corporations

Each of the three NSW port corporations are given a geographically defined port precinct within which they control port operations. Within the port precinct, the corporations have substantial land holdings, but there are also significant private port facilities which are owned or leased from other parties.

The business activities of the port corporations include pilotage, navigation and berthing of ships, managing shipping channels, managing and developing property, providing land for ship side and landside port businesses, managing port security, safety, the surrounding environment and logistics planning.

<sup>9</sup> Break bulk cargo is cargo that is transported in a non-containerised manner. Most break bulk consignments are comprised of self-contained units/packages, such as cars or timber packs.

Some port corporations also conduct non-commercial activities such as the provision of heritage, or a community or recreational structure or area.

The ownership of channel assets and submerged lands beneath wharves (often referred to as 'purple lands') are separated from the port corporations, and held by NSW Maritime. This reflects a legacy of the division created by the Ports and Maritime Administration Act 1995 (PMAA) (formerly known as the Ports Corporatisation and Waterways Management Act 1995). The policy premise of the Act is that the waterbed within a port (or in other places) should not be subdivided, which allows the Crown to retain ownership of 'the bed of the waters' and the State's natural resources.

This separation of channel and other submerged land ownership from the port corporations is a potential safeguard to retain open access to strategic ports and bays. The need to ensure user's rights to conduct a business over a public asset is addressed through each port corporations' channel agreement, which is like a business licence permitting activities such as: exclusive use of berthing boxes; the right to carry out maintenance dredging; and the exclusive right to direct commercial shipping in the channels.

Port corporations such as SPC own facilities that are hired out to various parties on a 'common user' basis or access is provided under lease arrangements which are on an exclusive basis for the tenants concerned. In the other corporation ports, most leases are granted on a common user access basis, and priorities for a dedicated use are established for tenants. Some berths are issued on an exclusive use basis at the smaller corporation ports.

#### **Operating environment for the port corporations**

- Are the commercial arrangements between port corporations and other participants the subject of fair negotiation?
- Is there equal bargaining power in the negotiation of terms?
- Are there any port corporation activities that do not comply with the NSW Government's *Policy Statement on the Application of Competitive Neutrality*, which outlines the commercial framework applying to NSW Government businesses, costing and pricing guidelines for NSW Government businesses, and mechanisms for considering competitive neutrality complaints against government businesses in NSW?<sup>10</sup>
- Are any elements of the operation of the port corporations inconsistent with clauses 4.1 and 4.2 of the CIRA?
- Are the port corporations constrained by non-commercial objectives that prevents them from earning a commercial rate of return on their investments?
- Are port corporations constrained in any significant way by their lack of ownership of the channel and/or submerged lands?

#### **Competition between and within ports**

The number of major ports in NSW is limited by geographic factors as ports are established to service population and economic activity centres (the case of Sydney) and/or to meet specialist industrial and trade demands

<sup>10</sup> The Statement on the Application of Competitive Neutrality is available from [http://www.cabinet.nsw.gov.au/publications/intergovernmental\\_and\\_regulatory\\_reform\\_branch\\_publications](http://www.cabinet.nsw.gov.au/publications/intergovernmental_and_regulatory_reform_branch_publications)

(Newcastle and Port Kembla). However, the number of ports is not necessarily an indicator of the degree of competition between them.

While Newcastle and Port Kembla enjoy exclusivity in servicing some of the bulk trades that their near-hinterlands support, they actively compete with each other and other Australian and overseas ports for the bulk trades of more distant hinterlands. Further, complete logistic chains (for example the Illawarra and Hunter coal chains) directly compete in international markets with other exporters in Australia and internationally.

Subject to planning approvals, it is possible to establish private port facilities around the four major harbours whereby the private sector would own the land and berth as well as the unloading equipment. Practical examples of this are the private berths at Gore Cove and Kurnell, and the existing and proposed new coal terminals established at Newcastle Port.

In terms of the capability for new entrants to establish new port facilities, when the three port corporations expand port-side land they may, for example, develop the sub-structures and berths and then offer the sites for long term rental via an open tender process.

The port corporations also operate in the context of the NSW Ports Growth Plan.

#### **Degree of competition between State owned port corporations**

- In what ways do the NSW port corporations compete with each other?
- To what extent could changes in transport infrastructure or technologies change the way that ports currently or could potentially compete with each other?
- To what extent do port corporations display natural monopoly characteristics?
- Is there any evidence of abuse of market power by any port corporation?

## **2.3 Shipping**

Shippers contract shipping lines for the carriage of goods. Shipping lines own and operate shipping vessels for the sea transportation of freight. They own the containers, allocate them to users, and manage them throughout the supply chain, penalising late returns to the docks. Shipping lines deal directly with freight forwarders, importers, exporters, stevedores, container parks, and regulatory authorities.<sup>11</sup>

Nearly 100 shipping lines provide scheduled services to Australian ports, and about 25 regularly dock at the container terminals at Port Botany. Many liner shipping services are provided under 'conference' and 'rate agreements' that relate to particular trades and cover markets including ship scheduling and tariffs.<sup>12</sup>

For general cargo (containerised and break-bulk), shipping services tend to be provided based on each separate voyage. Consequently shippers of general cargo tend to be locked into a particular 'bundle' of services, i.e. they cannot decide who provides stevedoring services or the level/price of

<sup>11</sup> IPART 2007, *Review of the interface between the land transport industries and the stevedores at Port Botany: Other industries – Issues Paper*.

<sup>12</sup> Productivity Commission 1998, *International Benchmarking of the Australian Waterfront*, Research Report, AusInfo, Canberra, April

services provided. For bulk cargo such as coal, grain and steel, the shippers, shipping lines and providers of port services tend to be more integrated.

Shipping lines, due to their scale, generally have a dominant influence on the terms of their relationships with land side enterprises. Under Part X of the TPA shipping lines are exempt from most of the anti-competitive provisions of the TPA and allowed to form cartels and agree on price and service levels. However, Part X does not provide exemptions from section 46 on misuse of market power, and Part X imposes certain obligations and requirements on shipping lines including negotiation with shipper bodies and information provision.

#### **Competitiveness and commerciality of shipping lines and shippers**

- Is there anything in the NSW ports regulatory framework which prevents the competitive setting of terms, conditions, and prices of shipping services?
- Are any elements of the operation of shipping inconsistent with clauses 4.1 and 4.2 of the CIRA?

## **2.4 Ancillary services to shipping lines**

Ancillary services to shipping lines and any independent shippers include pilotage, towage, linesmen, mooring, and ship repair. These services are provided mainly by private businesses in NSW, with the three State owned port corporations providing the pilotage.

Some ancillary services have relatively few or only one provider. Pilotage, towage, specialised bulk handling facilities and container handling services all are characterised by high fixed costs relative to operating costs, which suggest that if left to open market operations there may be a sole supplier of each.

- Towage is principally provided by one operator in each port, although Australian Maritime Services and Svitzer Australia compete in some locations.
- The NPC provides its own dredging service – the port having particular dredging needs and priorities due to its nature as a river mouth port. The SPC and PKPC both purchase dredging services from private providers.

Towage and mooring services are provided in all of the corporations' ports — these services not being covered by the statutory functions of the corporations, by safety provisions of their operating licences or by any functions determined by the Minister.

Given the inherent natural monopoly characteristics of many of these services, competition *for* the market is important to ensure that appropriate services are provided in a cost effective way.

### Competitiveness and commerciality of ancillary services

- To what extent is competition between ancillary service providers (or the threat of competition) achieved within ports?
- Do ancillary service providers actively compete with each other, and if so in what respects?
- Is there anything to prevent the competitive setting of terms, conditions, and prices of ancillary services?
- Is the competitiveness of the ancillary services market affected by regulated provider arrangements for port services in NSW?
- Are any elements of the operation of ancillary services inconsistent with clauses 4.1 and 4.2 of the CIRA?

## 2.5 Stevedoring

Stevedores are the intermediaries between the shipping lines and the transport operators. Stevedoring activities include 'ship side' lifting of cargo on and off vessels. For container cargo, the stevedores also provide 'land side' activities such as providing terminals for container transit, the storage and loading of containers on and off truck or rail transport, and the provision of vehicle booking systems.

Stevedoring services in Australia are concentrated with DP World (formerly known as P&O Ports) and Asciano Limited (owned by Toll Holdings) operating at the major ports. Port Kembla and Newcastle Ports both have additional stevedores, those being Illawarra Stevedoring and Newcastle Stevedores. New entry into stevedoring and logistics is mainly constrained by the need for substantial capital investments and the need to secure adequate volumes to be cost competitive.

The stevedores operating in the major ports considered in this review are shown in Table 3.

**Table 3 – Stevedore Service Providers at Major NSW Ports**

Geographic Harbour	Stevedore
Sydney Harbour	<ul style="list-style-type: none"> <li>▪ White Bay – DP World</li> <li>▪ Glebe Island – Australian Automotive Terminals Pty Ltd (AAT) – a joint venture between Asciano and DP World</li> <li>▪ Darling Harbour – DP World operates under an operating licence from Asciano</li> <li>▪ Gore Cove – private self-operated (by Shell)</li> </ul>
Port Botany	<ul style="list-style-type: none"> <li>▪ Brotherson Dock – Asciano &amp; DP World</li> <li>▪ Kurnell – private self-operated (by Caltex)</li> </ul>
Port of Newcastle	<ul style="list-style-type: none"> <li>▪ Newcastle Stevedores</li> <li>▪ DP World</li> </ul>
Port Kembla	<ul style="list-style-type: none"> <li>▪ Illawarra Stevedoring</li> <li>▪ DP World</li> <li>▪ Asciano</li> </ul>

Source: Port Websites 2007, and URS *Port Botany Expansion Environmental Impact Statement – Volume 1*, [http://www.sydneyports.com.au/\\_data/assets/pdf\\_file/0010/2404/Ch\\_03.pdf](http://www.sydneyports.com.au/_data/assets/pdf_file/0010/2404/Ch_03.pdf)

Some vertical 'bundling' of integrated services exists as stevedores expand their range of business activities to the landside interface part of the freight supply chain. Both DP World and Asciano have acquired significant interests in a range of transport and storage businesses in order to offer a more integrated freight logistics service.

Since the purchase of both stevedores by new owners, the approach of each now appears to be under review. Toll has recently been divesting its interests in certain freight and related transport businesses, selling some assets in line with undertakings given to ACCC following its acquisition of Patrick in March 2006.<sup>13</sup> More recently it created a new publicly listed company, Asciano in May 2007, which encompasses Patrick Stevedoring and much of the national rail freight business through Pacific National.<sup>14</sup>

DP World is also expanding its business interests to cover operations in other parts of the supply chain. Recent media reports have indicated DP World is moving P&O Ports towards specialising only in stevedoring activities, and as such are proposing to sell 50 per cent of its interest in P&O Trans which is a road and rail transport, storage, warehouse and distribution arm of P&O Ports operating at Port Botany.

Hutchison Whampoa's Hutchison Port Holdings (HPH) has recently entered the Australian stevedore market with it being named as preferred operator for Brisbane's new Fisherman Islands berths 11 and 12. HPH has plans to establish operations at other major Australian ports.<sup>15</sup>

### **Competition in stevedoring**

The market structures that exist in stevedoring partly reflect the high fixed costs and costs of entry linked with stevedoring and port operations requiring land and asset ownership. New entrants face significant challenges or barriers to entry in the form of large upfront capital investments, challenges securing waterfront land, and competing in a cost sensitive market with economies of scale against incumbent operators who already have contractually secured large volumes. In this environment, long tenure becomes an important aspect of making operations viable.

Long tenure may also be expected to create potential barriers for players exiting the market. Long term leases create incentives for investing in assets at the front end of a lease, potentially leaving a long tail period with limited investment.

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<sup>13</sup> IPART 2007, *Review of the Interface between the Land Transport Industries and the Stevedores at Port Botany – Issues Paper*, May 2007

<sup>14</sup> The Age Website 2007, *Asciano on track for likely rail boom*, 30 May 2007

<sup>15</sup> World Cargo News Website April 2007, *HPH wins Australian foothold*, <http://www.worldcargonews.com/html/t20070512.875349.htm>

### **Competitiveness and commerciality of stevedoring services**

- To what extent is competition between stevedores (or the threat of competition) achieved within ports?
- What are the key determinants of market entry and exit for stevedoring firms, and to what extent do prices and regulatory arrangements have a material impact on entry or exit decisions?
- Are the terms, conditions, and prices, or other business practices which determine access to the port terminals considered to be competitive?
- Is the competitiveness of the stevedoring market affected by regulated provider arrangements for port services in NSW?
- Does the vertical integration of stevedoring with other activities create any potential conflict of interest, and if so to what effect?
- Are any elements of the operation of stevedoring that are inconsistent with clauses 4.1 and 4.2 of the CIRA?

## **2.6 Road and rail transport operators**

Both road and rail transport operators move cargo from stevedores and storage on behalf of importers and exporters. In terms of rail operators, there are 4 rail operators that dominate the market, and 2 rail infrastructure providers that are integral players. The road freight market is more diverse, characterised by a range of road operators. Land transportation to and from Port Botany is dominated by road, with 80 percent of containers transported by road and 20 percent transported by rail.<sup>16</sup>

The core activities at the ports of Newcastle and Port Kembla involve bulk cargoes requiring specialised facilities and handling. In Newcastle the Hunter Valley Rail Network handles coal from mines in the Hunter Valley to the Port. The vast majority of export coal shipped through Newcastle is transported to port by rail. Port Kembla receives 65 per cent of coal by rail each year for discharge at the Port Kembla Coal Terminal's (PKCT) rail receival bins. The trains are operated by Pacific National, and the Terminal generally handles seven trains a day. Port Kembla is within 30-40 minutes by road from the Southern Coalfields mines making road a transport mode for a range of cargo at the Port.<sup>17</sup>

### **IPART review**

The Independent Pricing and Regulatory Tribunal (IPART) has been requested by the Premier to undertake a review of the interface between the operators of containerised land transport and the stevedores at Port Botany. IPART is to examine the ways in which road and rail transport operators connect with the two stevedores at Port Botany, including looking at the fees charged for various services, the underlying costs of those services, the efficiency of logistics operations and terms and conditions of access to the port facilities for the moving of containers.

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<sup>16</sup> IPART 2007, *Review of the Interface between the Land Transport industries and the Stevedores at Port Botany*, May

<sup>17</sup> NSW Government Submission to the House of Representatives Standing Committee, *Integration of Regional Transport Links and their Interface with Ports*, June 2005, <http://www.aph.gov.au/house/committee/trs/networks/subs/sub096.pdf>

IPART is specifically required to have regard to the port competition and regulation principles set out in clauses 4.1 and 4.2 of the CIRA.

IPART is due to release a Draft Report in September 2007, and a Final Report in December 2007 and IPART's draft findings will be taken into account in finalising this Review.

**Competitiveness and commerciality of logistics services**

- Are logistics services constrained in any way by the regulation of major NSW ports?
- Are any elements of the operation of freight logistics chains as they connect to NSW Ports inconsistent with clauses 4.1 and 4.2 of the CIRA?
- What are the key determinants of market entry for logistics firms, and to what extent do prices and access arrangements have a material impact on entry or exit decisions?

## **3 Regulatory framework for NSW ports**

Port regulation has various impacts on a range of port services and operations and the market structures that exist in major NSW ports. There are several legislative and policy frameworks that provide the regulatory framework for the operation of major NSW ports.

### **3.1 Policy framework for port competition and regulation**

#### **The National Reform Agenda, the CIRA, and the Competition Principles Agreement**

The Council of Australian Governments (COAG) agreed to the National Reform Agenda (NRA) in February 2006. The national principles for port competition and regulation are embodied in the NRA, which, among other things, seeks to implement a best practice reform framework to ensure regulatory arrangements are efficient, well targeted, and do not unnecessarily restrict competition.

To support the objectives of the NRA, the Council of Australian Governments (COAG) signed the CIRA in February 2006. The main purpose of the CIRA is to provide for a simpler and consistent national approach to the economic regulation of nationally significant infrastructure, including through recognition that, in the first instance, the terms and conditions of access to such infrastructure should be determined through commercial negotiation, and that economic regulation should only be used where it is warranted.

At its February 2006 meeting, COAG also recommitted to the principles set out in its 1995 Competition Principles Agreement (CPA). Of direct relevance to this review, clause 5 of the CPA requires that regulation should not restrict competition unless it can be demonstrated that the benefits outweigh the costs, and that the objective of the regulation can only be achieved by restricting competition. This principle is reflected in clause 4.2 of the CIRA, which forms part of the terms of reference for this review.

#### **NSW Ports Growth Plan**

The promotion of competition in NSW ports is also embodied in the NSW Ports Growth Plan, released in 2003. The Plan includes the relocation of containers, general cargo and car stevedoring from Port Jackson to Port Kembla as existing leases expire, subject to satisfactory commercial negotiations being completed between the lessees and the Port Kembla Port Corporation. The former BHP steelworks site at Newcastle Port is also anticipated to be secured for port use. When Port Botany reaches capacity Newcastle will be the state's next major container facility. A plan is to be established to retain White Bay for working maritime uses, to create an unbroken run of public access to the foreshore of the harbour between Woolloomooloo and the Anzac Bridge. The plan also includes consideration of increasing the proportion of containers moved by rail to and from the ports to intermodal terminals in both the Sydney metropolitan area and regional NSW.

The transfer of significant volumes of imports to Port Kembla and Newcastle is likely to have a long term impact on the competitive environment in NSW ports by fragmenting the dominance of imports in the Sydney ports.

## **Commercial policy framework**

The port corporations provide a range of ancillary services that are also carried out privately within the market. When this is the case, the corporations need to comply with the NSW Treasury *Policy Statement on the Application of Competitive Neutrality*. The Policy is designed to eliminate resource allocation distortions by removing any net competitive advantage/s of significant Government business activities that may arise as a result of public sector ownership.<sup>18</sup>

NSW Treasury administers the Commercial Policy Framework which governs all state owned corporations and undertakes regular financial monitoring of Government businesses from the Shareholders' perspective. Each year, the management of a SOC is required to enter into an agreement with the Shareholders, known as the Statement of Corporate Intent (SCI). This details the objectives and strategic directions of the business, along with financial performance targets and other related matters, such as risk management. Quarterly reports are required, which show the business' actual performance against the annual targets set out in the SCI. In addition, Treasury monitors financial distributions in the form of dividend payments and tax equivalents, as these represent a substantial contribution to State budget revenue.

### **3.2 Legislative architecture for NSW ports**

#### **State Owned Corporations Act 1989 (SOCA)**

The *State Owned Corporations Act 1989* (SOCA) provides the corporatisation framework within which statutory stated owned corporations like the three port corporations operate, and creates incentives for the port corporations to operate efficiently in a commercial environment. Under the SOCA, the voting shareholders of each of the Port Corporations include the Treasurer and another Minister (other than the portfolio Minister) nominated by the Premier. The Corporations' board of directors are recommended by the voting shareholders, and the PMAA imposes an additional requirement that the portfolio Minister be consulted about any such recommendations and the board's statement of corporate intent.

#### **Trade Practices Act 1974**

The *Trade Practices Act 1974* (TPA) also affects providers of port services, particularly via Section 46, which precludes taking advantage of market power in an anti-competitive way, by banning conduct such as:

- refusal to supply – which in this case is affected by waterfront land scarcity at some ports and incumbent tenants with long term leases, which can make it difficult for new operators to enter. These factors would be examined given that NSW Government owned landlord ports currently have no material conditions which could constitute a refusal to supply;
- anti-competitive price discrimination – which would require evidence of differential treatment to different types of customers or discounting for volume or long term contracts from the published price lists; and
- predatory pricing – which would require evidence of pricing below the cost.

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<sup>18</sup> Source: NSW Treasury 2002, *Policy Statement on the Application of Competitive Neutrality, Policy & Guidelines Paper*, January.

Part IIIA of the TPA establishes a regime for third party access to essential infrastructure facilities of national significance.

### **Ports and Maritime Administration Act 1995 (PMAA)**

The function, role and legislative framework for the Maritime Authority of NSW (NSW Maritime) and the port corporations are defined in the *Ports and Maritime Administration Act 1995* (PMAA).

The introduction of PMAA in 1995 dissolved the pre-existing Maritime Services Board (MSB). At that time, SOCA was in place, which provided a corporatisation framework within which state owned trading enterprises could operate. In 1995, the PMAA reconstituted each of the three subsidiary port authorities of the MSB (for Newcastle, Sydney and Port Kembla) as SOCs.

NSW Maritime (formerly the Waterways Authority) remained a stand-alone authority answerable to the then Minister for Ports. A Marine Ministerial Holding Corporation (MMHC), managed and controlled by the Minister, was also established to hold residual assets and liabilities not transferred to the new bodies and to dispose of surplus property. The MMHC has subsequently been terminated, with its assets transferred to NSW Maritime.

The PMAA gives an exclusive licence to each of the port corporations to coordinate movement of commercial vessels through channels and to secure them to wharves, buoys and dolphins. It does not grant port corporations sole powers within all aspects of their ports. The ownership of all wetlands in port areas, including channels, was transferred to NSW Maritime.

The PMAA effectively allows only port corporations or NSW Maritime (via delegated responsibility from the Minister) to control the safety and navigation arrangements for ports in NSW. Several functions necessary for the movement and handling of vessels can also only be undertaken by these bodies.

While the corporations operate according to a landlord model, providing only 'core activities', there is considerable discretion regarding what services are considered contestable and the corporations enjoy a degree of preferment. For example, if the Minister enters contracts for the provision of pilotage services, he/she must call tenders and address a number of matters specified in the Act.

#### **Impact of regulation on port services**

- Does the port corporations' legislative framework lock out private suppliers of contestable services?
- Does the regulatory framework established by the PMAA prevent competitive outcomes, and if so, in what ways?
- In the absence of port regulation, in what respects might the market for port services 'fail'?
- Does the regulatory framework for ports in NSW result in any undue delay to timely investment in new infrastructure?

### **3.3 Operating licences for the port corporations**

Each of the port corporations is required to carry out certain port safety functions under their port safety operating licence, which specifies a number of matters to be ensured.

The Port Safety Operating Licence (PSOL) is audited annually by a third party and administered by NSW Maritime on behalf of the Minister for Ports and Waterways. As an example of the requirements of a PSOL, under SPC's PSOL it is charged with fulfilling conditions linking the safety of shipping with the preservation of the marine environment. In addition to maintaining safe navigation in the ports for commercial shipping and administering the Dangerous Goods Regulations for port areas, SPC also has responsibility for emergency response to marine-based incidents and for the clean-up of any environmental spills for the Harbour, Botany Bay and for 90km of the NSW coastline for three nautical miles out to sea.<sup>19</sup> The port operating licenses are not a focus of the CIRA or this review.

### **3.4 Channel agreements**

Channel agreements grant the corporations a non-exclusive licence for them or their clients to move over channels, undertake maintenance dredging or control navigation aids.

NSW Maritime is reviewing the existing channel agreements with the port corporations. The channel agreement is negotiated for a three year period, with the port corporations required to pay a channel fee for each year that the Agreement is in force.

In late 2006, the terms of a new PSOL were negotiated with the Port Corporations, resulting in agreement that a single fee would be charged. The fee functions as a combined PSOL fee and market-based fee associated with carrying on a commercial business over land vested in NSW Maritime.

### **3.5 Regulatory authorities**

NSW Maritime is a statutory State Government owned entity that earns revenue from a range of licence fees, mooring charges, registration fees and lease incomes which make it a self-funding entity. It is constituted by Part 4 of the PMAA. Its functions are those conferred or imposed on it by marine or other legislation and such waterways management or other functions delegated to it by the Minister under the PMAA 1995 or other legislation in his/her jurisdiction.

NSW Maritime provides advice on port and maritime matters to the Minister for Ports and Waterways and licenses individuals to operate boats and ships. NSW Maritime fulfils a mix of policy, regulatory, commercial and community amenity functions. Its functions reside principally in the fields of port and maritime policy, marine safety and environmental protection and the control of major aquatic events. Its regulatory activities include small commercial and recreational vessels, and many of its amenity functions also relate to these vessels. It provides some non-commercial safety, environmental and amenity services such as removing floating litter and navigation hazards from Sydney Harbour and its foreshores.

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<sup>19</sup> Source: Sydney Ports Website 2007, [http://www.sydneyports.com.au/port\\_operations/port\\_safety](http://www.sydneyports.com.au/port_operations/port_safety)

## 4 Consistency of the regulatory and policy framework with the CIRA

The terms of reference for this review are to review the regulation of the Sydney Ports, the Port of Newcastle, and Port Kembla against the principles set out in Parts 4.1 and 4.2 of the CIRA. The following issues are raised to assess the consistency of NSW port regulation with these principles.

### 4.1 Is economic regulation required?

The CIRA stipulates that ports should only be subject to economic regulation where a clear need for it exists in the promotion of competition in upstream or downstream markets<sup>20</sup> or to prevent the misuse of market power.

Port charges comprise a very small component of end to end transport costs. There is currently no independent regulatory oversight of prices in NSW, which are set by the Minister for Ports as per the PMAA. In Victoria, Queensland and South Australia, some port services are subject to price capping or price monitoring. The CIRA states that if regulatory oversight of prices is warranted, this should be undertaken by an independent body which publishes relevant information.

There are a range of charges for services provided by the port corporations. In the role as 'landlord' over infrastructure the port corporations typically have a wharfage charge. All three port corporations also have a navigational service charge to recover costs relating to their statutory safety obligations.

However, some non-statutory charges may be made for the provision of wharfside services for vessels (water supply, electricity and telephones), and information clearance services may be provided commercially, such as the central bookings system of the SPC.

#### **Competitiveness and commerciality of prices**

- To what extent do port charges represent a barrier to entry or impact upon the degree of contestability?
- To what extent do charges affect port volumes and costs to users?
- Would price monitoring or setting of port corporation charges increase up stream or downstream competition?

### 4.2 Where relevant, are third party access arrangements agreed between the parties?

The commerciality of the terms of access to services is a key determinant of the competitiveness of port operations, irrespective of the number of market players, and whether any dominance relates to regulated or commercial barriers to entry.

In practice most key port facilities have publicly available Terms and Conditions for usage that potential customers are able to assess and potentially negotiate changes. Port corporations lease facilities they own or

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<sup>20</sup> Upstream competition refers to competition in the shipping market, and down stream competition refers to competition in the stevedoring and logistics markets.

control to other service providers and this usually gives the tenant exclusive long term access.

There are some examples of commercially negotiated facility usage agreements between asset owners and third parties across major NSW ports.

There are also a number of berths operated by the port corporations on a multi-user/open access basis such as the Port Botany Bulk Liquids Berth and the general freight Western Basin Berth (No 4) in Newcastle. The Port Corporations have terms and conditions for use of these multi-user berths.

There is no State-based third-party access regime for ports in NSW. However, arguably a number of key facilities could be subject to the National Access Regime in the *Trade Practices Act*.

If a State-based access regime was developed, the CIRA states that it should be certified in accordance with the *Trade Practices Act 1974* and the Competition Principles Agreement.

#### **Commerciality of terms and conditions**

- Do commercially negotiated facility usage agreements between asset owners and third parties reflect any use or abuse of market power? If so, in what regard?
- Do the terms and conditions of multi-user/open access berths reflect any use or abuse of market power? If so, in what regard?
- Is reliance on the TPA to resolve potential disputes over access terms and conditions adequate? Is there a rationale for the development of a State-based access regime to apply to ports in NSW?

### **4.3 Do the benefits of any restrictions to competition outweigh the costs to the community?**

The policy and regulatory environment governing ports in NSW does impact on competition between port service providers and service users.

The CIRA requires that there should be competition in the provision of port and related services, including through the following:

- port planning should facilitate the entry of new suppliers of port and related infrastructure services;
- that any third party access should be provided on a competitively neutral basis;
- commercial charters for port authorities should include guidance to seek a commercial return while not exploiting monopoly powers; and
- any conflicts of interest between port owners, operators, or service providers due to vertically integrated structures be addressed by the relevant Party on a case by case basis with a view to facilitating competition.

The CIRA also provides that competition in such services should only be restricted where a transparent public review has demonstrated that the benefits of the restriction outweigh the costs. This is consistent with clause 5 of the CPA.

**Extent of restrictions to competition**

- Do existing planning arrangements effectively allow for new entrants to establish new port facilities?
- Does the use of open tender processes for port and related services encourage competition?
- Do the long term leases for stevedores foster or inhibit competition?
- Do the private berths at Gore Cove and Kurnell and the new coal terminal at Newcastle Port provide evidence of competition at the berths?
- Does the regulatory environment in NSW impose any other restrictions on competition? Has it been demonstrated that the benefits outweigh the costs?

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## Appendix A: Terms of reference

The terms of reference for this review mirror Part 4.1, 4.2, and 4.3 of the CIRA, which include the following tasks.

- 1 Review the regulation of the Sydney Ports (Port Botany, Glebe Island, White Bay, and Darling Harbour), Port of Newcastle and Port Kembla (including the handling and storage facility operations at those ports) against the following principles:

### *Economic Regulation of Significant Ports*

- 1 Ports should only be subject to economic regulation where a clear need for it exists in the promotion of competition in upstream or downstream markets or to prevent the misuse of market power.
- 2 Where economic regulation of significant ports is warranted, it should conform to a consistent national approach based on the following principles:

wherever possible, third party access to services provided by means of ports and related infrastructure facilities should be on the basis of terms and conditions agreed between the operator of the facility and the person seeking access;

where possible, commercial outcomes should be promoted by establishing competitive market frameworks that allow competition in and entry to port and related infrastructure services, including stevedoring, in preference to economic regulation;

where regulatory oversight of prices is warranted, the introduction of price monitoring for services provided by means of significant infrastructure facilities should be considered as a first step where price regulation may be required or when scaling back from more intrusive regulation, and regulatory oversight should be undertaken by an independent body which publishes relevant information; and

where access regimes are required, and to maximise consistency, those regimes should be certified in accordance with the *Trade Practices Act 1974* and the Competition Principles Agreement.

### *Competition in Port and Related Infrastructure Facility Services*

3 Competition in the provision of port and related infrastructure facility services should be allowed, unless a transparent public review indicates that the benefits of restricting competition outweigh the costs to the community, including through implementation of the following:

port planning should, consistent with the efficient use of port infrastructure, facilitate the entry of new suppliers of port and related infrastructure services;

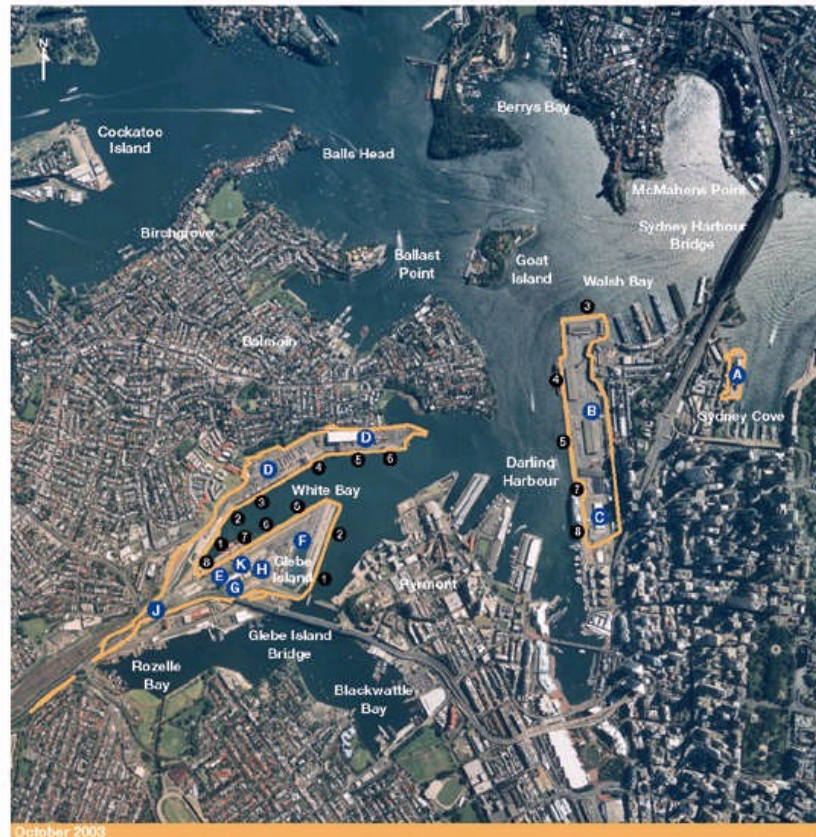
where third party access to port facilities is provided, that access should be provided on a competitively neutral basis;

commercial charters for port authorities should include guidance to seek a commercial return while not exploiting monopoly powers; and

any conflicts of interest between port owners, operators or service providers as a result of vertically integrated structures should be addressed by the NSW Government on a case by case basis with a view to facilitating competition.

## Appendix B: Four harbours with significant port facilities in NSW

Figure 4 – Sydney Harbour Port Facilities



**KEY**

- |   |  |
|---|--|
| <b>A</b> Overseas Passenger Terminal                    | <b>G</b> Glebe Island – Cement Australia                 |
| <b>B</b> Darling Harbour – Patrick Corporation          | <b>H</b> Glebe Island – Sugar Australia                  |
| <b>C</b> Darling Harbour – Passenger Terminal           | <b>J</b> Glebe Island – Sydney Ferries Marine Operations |
| <b>D</b> White Bay – P&O Ports                          | <b>K</b> Glebe Island – Gypsum Resources Australia       |
| <b>E</b> Glebe Island – Perrier Soda Products           | <b>1</b> Berth Numbers                                   |
| <b>F</b> Glebe Island – Australian Automotive Terminals | <b>2</b> Sydney Ports' Property                          |

Source: NSW Maritime Website, [http://www.waterways.nsw.gov.au/ports\\_plan.html](http://www.waterways.nsw.gov.au/ports_plan.html)

**Figure 5 – Newcastle Port Facilities**



Source: NSW Maritime Website, [http://www.waterways.nsw.gov.au/ports\\_plan.html](http://www.waterways.nsw.gov.au/ports_plan.html)

Figure 6 – Port Kembla Port Facilities



Source: NSW Maritime Website, [http://www.waterways.nsw.gov.au/ports\\_plan.html](http://www.waterways.nsw.gov.au/ports_plan.html)

**Figure 7 – Port Botany Port Facilities**



**KEY**

- |                                |   |
|--------------------------------|---|
| A P&O Trans Aust. Holdings Ltd | J P&O Ports                                 |
| B Vopak Terminals              | K Patrick Corporation                       |
| C Orca Australia Pty Ltd       | L Caltex Petroleum Pty Ltd                  |
| D Elgas                        | M Australian Customs Services               |
| E Terminals Pty Ltd            | N Randwick City Council                     |
| F Origin Energy LPG Limited    | O Warehouse Solutions International Pty Ltd |
| G Patrick Port Services        | ● Berth Numbers                             |
| H P&O Trans Aust. Holdings Ltd | ■ Sydney Ports' Property                    |

Source: NSW Maritime Website, [http://www.waterways.nsw.gov.au/ports\\_plan.html](http://www.waterways.nsw.gov.au/ports_plan.html)